

EXHIBIT M

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5
6 IRVING H. PICARD, TRUSTEE FOR

7 LIQUIDATION OF B., Adv. No. 12-01576 (SMB)

8 Plaintiff,

9 v.

10 BNP PARIBAS, S.A., ET AL.,

11 Defendants.

12 - - - - - x

13
14 U.S. Bankruptcy Court

15 One Bowling Green

16 New York, NY 10004

17
18 January 23, 2018

19 10:07 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

1 Hearing re: Discovery conference

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25 Transcribed by: Jamie Gallagher

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1 P R O C E E D I N G S

2 THE COURT: Picard vs. BNP Paribas. Go ahead.

3 Who represents the trustee?

4 MR. FORMAN: Good morning, Your Honor. Jonathan
5 Forman, and I'm with my colleague, Joanna Wasick.

6 MS. WASICK: Good morning, Your Honor.

7 THE COURT: How do you do? Go ahead.

8 MR. FORMAN: Your Honor, we're here today because
9 the trustee requested a Rule 26(f) conference with BNP
10 Paribas defendants. And in order to help the dialogue and
11 plan discovery, we provided Rule 34 requests in advance of
12 that conference. BNP Paribas defendants, however, have
13 refused our request and we're at a standstill.

14 I think it's important to give an overview of
15 where we are and how far this -- how long this case has been
16 before the Court. It's time for discovery at this point
17 because we -- it's been five years -- over five years and
18 the trustee has been unable to initiate discovery. We filed
19 our complaint in May 2012. And a couple of months after
20 that, the proceeding was withdrawn to the District Court.
21 And we survived that attack. And now we're looking to move
22 forward with the case.

23 THE COURT: You survived a lot of attacks and a
24 lot of withdrawals in the District Court.

25 MR. FORMAN: There is a withdrawal on the basis of

1 extra-territoriality because a motion to dismiss, we briefed
2 that --

3 THE COURT: You won that extra territory.

4 MR. FORMAN: We survived that.

5 THE COURT: All right. Go ahead.

6 MR. FORMAN: So in order to move the case forward,
7 we filed an amended complaint and we've asked the defendants
8 to participate in a Rule 26(f) conference as required by the
9 Federal Rules of Civil Procedure and as required by the
10 rules of this Court.

11 THE COURT: Well, one of the arguments that the
12 defendants make in their motion papers is that you shouldn't
13 have filed that complaint. That contributed as a motion to
14 amend, I suppose. But there's still no amended complaint,
15 right? Until the Court authorizes it?

16 MR. FORMAN: The Court does.

17 THE COURT: Is that correct?

18 MR. FORMAN: We filed it and we believe that we
19 are well within our rights to file the amended complaint
20 based on the Judge Rakoff's --

21 THE COURT: But there were specific orders after
22 the extra-territoriality decision, which I thought said if
23 you wanted to amend it on good faith, which is basically
24 what we're talking about, you had to come back to the Court
25 for another order, right? Let me hear from this side. I

1 think that's one of the issues I have that it may just be
2 premature.

3 MS. XU: Good morning, Your Honor. Donna Xu for
4 the BNP Paribas defendants and I'm here with my colleagues,
5 Ari MacKinnon and Breon Peace.

6 THE COURT: All right. Please keep your voice up.

7 MS. XU: So as opposing counsel --

8 THE COURT: If you stand at the podium, you may
9 not have to bend over like this. Thank you.

10 MS. XU: Thank you, Your Honor. So as opposing
11 counsel just mentioned, he had survived the ETA motion to
12 dismiss, but I think the procedural history of this case
13 shows right now isn't the time to commence discovery.

14 THE COURT: My only question is I thought you took
15 the position that he couldn't file an amended complaint
16 until the Court ordered it, right?

17 MS. XU: Yes, Your Honor.

18 THE COURT: Is there a dispute about that, Mr.
19 Forman? I thought there were orders to that effect?

20 MR. FORMAN: I believe there is a stipulation
21 between the parties that would allow us to file the
22 complaint that we filed.

23 THE COURT: I thought only on the extra-
24 territoriality issues, though. I'm a little confused, but
25 okay. All right. Go ahead. They don't want to give you

1 any discovery. They want to wait until the motion to
2 dismiss is decided. Tell me why you shouldn't have to
3 undergo discovery since filing of a motion to dismiss
4 doesn't stay it.

5 MS. XU: Well, Your Honor is correct that the
6 filing of a motion to dismiss doesn't automatically stay
7 discovery. However, in this particular case, there are
8 compelling reasons as to why discovery should be stayed.
9 First of all, the motion to dismiss has been fully briefed
10 and we believe that we have a strong basis for dismissal
11 that can render moot any need for discovery at all.

12 As Your Honor is aware, there have been previous
13 cases in the Madoff context on which similar allegations
14 have been made as to the defendant's knowledge and willful
15 blindness. And we submit that the allegations against BNP
16 in particular are far weaker than those and have --

17 THE COURT: So are you saying that I have to
18 decide the motion to dismiss before I can decide to stay
19 this (indiscernible) until I decide the motion to dismiss?

20 MS. XU: As a technical matter, our position is
21 that you'd need not decide fully the motion to dismiss. But
22 given that our arguments are strong, we believe that the
23 prudent, reasonable course of action is simply to wait a few
24 months until that motion is decided. Otherwise, subjecting
25 the BNP defendants to discovery would result in extremely

1 burdensome next steps that a 26(f) conference would open up.
2 And not only that, but we believe that the trustee can't
3 demonstrate why they would be prejudiced by a mere delay of
4 the few months.

5 We think that following those few months, we have
6 can have additional clarity as to what claims, if any, are
7 even left in the action.

8 THE COURT: All right. To just save time, this is
9 just a conference. So if you want discovery, you're going
10 to have to make a motion to compel discovery and you can
11 make your argument about the burden with evidence of what
12 the burden is, just don't tell me it's too burdensome.
13 Okay?

14 MR. FORMAN: With respect, Your Honor, I believe
15 the burden is on the defendants in this issue.

16 THE COURT: Well, you know, it's who goes first.
17 You may be right but they're saying they're not going to
18 produce the discovery. So the only way you can get it is to
19 make a motion and compel discovery.

20 MR. FORMAN: But at this point, there are no
21 requests that have been served on -- and there's no act of
22 discovery. We're sort of in limbo.

23 THE COURT: I thought you served discovery
24 requests?

25 MS. FORMAN: We did but their -- we gave them our

1 requests.

2 THE COURT: Right.

3 MR. FORMAN: But they're not deemed served until
4 we have the Rule 26(f) conference. We gave them our request
5 in advance in order to help the dialogue so that we can
6 discuss and figure out how to plan discovery.

7 THE COURT: Well --

8 MR. FORMAN: They haven't even sat down to meet
9 with us.

10 THE COURT: All right. Well, we'll deem them
11 served. You can meet -- you should have met and conferred
12 first. I take it that they don't want to meet and confer?

13 MR. FORMAN: Correct, Your Honor.

14 THE COURT: You should certainly have the
15 conference. And then if you can't resolve it, just make a
16 motion to compel discovery. That's the only way that this
17 is going to move along because you're at (indiscernible).
18 Okay?

19 MR. FORMAN: Thank you, Your Honor.

20 THE COURT: Anything else? All right, thank you.

21 MS. XU: Thank you, Your Honor.

22 (Whereupon these proceedings were concluded at 10:14
23 AM)

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C E R T I F I C A T I O N

I, Jamie Gallagher, certify that the foregoing transcript is
a true and accurate record of the proceedings.

Jamie
Gallagher

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[& - first]

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